

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SPANISH COVE SANITATION, INC.

ALLEGED VIOLATION OF KRS 278.160

)
)
) CASE NO. 97-107
)

O R D E R

Spanish Cove Sanitation, Inc. ("Spanish Cove") and John Lawson (collectively "the Movants") have moved for rehearing on the Commission's Order of October 12, 1998. Having considered the motion, the Commission finds that rehearing should be granted to correct an erroneous application of the statute of limitations and the doctrine of res judicata. By this Order, the Commission modifies the provisions of the October 12, 1998 Order related to the refunding and collection of improperly billed amounts.

The Movants present three arguments in support of their motion for rehearing. First, they argue that a drastic change in Spanish Cove's operations requires reconsideration. Pursuant to an Order of the Natural Resources and Environmental Protection Cabinet, the Louisville-Jefferson County Metropolitan Sewer District ("MSD") has intercepted Spanish Cove's sewage collection lines and diverted the sewage flows into its own sewage collection lines. As a result, Spanish Cove's sewage treatment plant is no longer operating.

The Commission finds that, while MSD's recent action drastically alters Spanish Cove's operations, it does not affect this proceeding. The issue before the Commission is the improper billing of Spanish Cove customers. This billing occurred long before MSD's actions and remains unaffected by them. MSD's actions do not modify the right of Spanish Cove customers to be charged only the filed rate for their sewer service, nor does it lessen their right to a refund of improperly collected amounts.

The Movants next argue that the Commission improperly applied the statute of limitations when determining the amount of refunds and underbilling. They assert that the Commission erred in retroactively applying KRS 278.225 to services provided before July 15, 1994. They further assert that, when applying KRS 413.120, the Commission erred in holding that the statute of limitations ran from October 12, 1998 (the date of the Commission's decision) rather than March 18, 1997 (the date on which the Commission commenced these proceedings).

The Commission finds merit in both these arguments. KRS 278.225, which provides that "[n]o customer shall be liable for unbilled service after two (2) years from the date of the service," became effective on July 15, 1994. "A statute has no retroactive application unless it is specified in the statute expressly." Gould v. O'Bannon, Ky. 770 S.W.2d 220, 221 (1989). As KRS 278.225 does not contain such provision, it applies only to services rendered on and after July 15, 1994, and cannot bar Spanish Cove from collecting underbilled amounts for service provided prior to July 15, 1994.

The Commission further finds that, for purposes of KRS 413.120(2), an action to collect the improperly billed amounts commenced on March 18, 1997, when the

Commission initiated this proceeding. KRS 413.120(5) provides that an "action upon a liability created by statute, when no other time is fixed by the statute creating the liability," must be brought within 5 years of the time the cause of action accrues. In the present case, an action for violation of KRS 278.160 accrued when the utility improperly billed its customers. Either the Commission or individual customers subject to the improper billing could initiate administrative or judicial proceedings against the utility for these violations. The Commission, by issuing its Order of March 18, 1997, and directing Spanish Cove to show cause why a reconciliation of its billings should not be ordered, commenced an action¹ against Spanish Cove and stopped the running of the statute of limitations. Any calculation on unbilled amounts subject to recovery, therefore, must be based upon that date.

Finally, the Movants argue that any claim of overbilling which T.K.'s Pub may possess is barred by the doctrine of res judicata. In Case No. 96-340,² the owner of T.K.'s Pub brought a complaint against Spanish Cove for charging improper rates for sewer service. The Commission subsequently dismissed this case when the Complainant failed to appear at the scheduled hearing in the matter.

Res judicata is a "common-law concept which prescribes that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" Drummond v. Commissioner of Social Security, 126 F.3d 837, 840 (6th Cir. 1997). It is intended to "relieve parties of

¹ As to whether the Commission's administrative proceedings constituted an action, see Commonwealth, Natural Resources and Environmental Protection Cabinet v. Kentucky Insurance Guaranty Association, Ky.App., 972 S.W.2d 276 (1997).

² Case No. 96-340, Michael Todd King d/b/a T.K.'s Pub, Inc. v. Spanish Cove Sanitation (March 18, 1997).

the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decision, encourage reliance on adjudication.” Allen v. McCurry, 449 U.S. 90, 94 (1980). It bars the relitigation of the same claim or cause of action. The doctrine of res judicata has long applied to the quasi-judicial acts of administrative agencies. See, e.g., Cardinal Bus Lines v. Consolidated Coach Corp., 254 Ky. 586, 72 S.W.2d 7 (1934).

Having reviewed the proceedings in Case No. 96-340, the Commission concludes that the doctrine of res judicata bars any claim for improper billing of T.K.’s Pub. The claim raised in this proceeding is identical to that raised in Case No. 96-340. To the extent that the claim was dismissed because the Complainant failed to appear and to meet his burden of proof, the Commission adjudicated the merits of his claim. This adjudication prevents the Commission from subsequently relitigating the issue and rendering a conflicting decision.

Having considered the motion for rehearing and being otherwise sufficiently advised, the Commission finds that:

1. The Movants’ Motion for Rehearing should be granted.
2. Table I indicates the discrepancies between Spanish Cove’s filed rates and billed rates. This table further reflects the effects of the application of the statute of limitations and doctrine of res judicata.

TABLE I

Customer	Units	Occupancy Date	Amount Charged	Filed Rate (Monthly)	Monthly Difference	Annual Difference	Months of Service	Total Difference	Amount of Refund (Billing) Required (B)
T.K.'s Pub		9/4/94	\$ 160.00	\$ 32.00	\$ 128.00	\$ 1,536.00	40	\$ 5,120.00	\$ 0.00(C)
Concord Custom Cleaners		10/13/89	\$ 150.00	\$ 32.00	\$ 118.00	\$ 1,416.00	96	\$11,328.00	\$ 7,080.00
Winn-Dixie		3/30/95	\$ 195.00	\$ 32.00	\$ 163.00	\$ 1,956.00	31	\$ 5,053.00	\$ 5,053.00
5500 Delmarie Way (A)	12	7/5/89	\$ 136.00	\$ 138.00	\$ (2.00)	\$ (24.00)	99	\$ (198.00)	\$ (70.00)
5502 Delmarie Way (A)	12	1/4/85	\$ 136.00	\$ 138.00	\$ (2.00)	\$ (24.00)	153	\$ (306.00)	\$ (70.00)
Fireside Properties, Inc. (A)	4	12/11/92	\$ 45.00	\$ 46.00	\$ (1.00)	\$ (12.00)	58	\$(58.00)	\$ (35.00)
SMV Properties (A)	20	5/10/95	\$ 15.30	\$ 230.00	\$ (214.70)	\$(2,576.00)	29	\$ 6,226.30	\$(1,288.20)
Hurstbourne Terrace Apartments (A)	72	12/22/92	\$ 745.50	\$ 828.00	\$ (82.50)	\$ (990.00)	58	\$(4,785.00)	\$(2,887.00)
Hurstbourne Gardens Apartments (A)	48	8/29/86	\$ 497.00	\$ 552.00	\$ (55.00)	\$ (660.00)	134	\$(7,370.00)	\$(1,925.00)

Key: A - Apartment Building

B - Amount that Spanish Cove may backbill or be required to refund when KRS 278.225 and KRS 424.120(2) are considered. For all service rendered on or after July 15, 1994, KRS 278.225 provides that no customer shall be liable for unbilled service after 2 years from the date of the service. KRS 424.120(2) requires that an action upon a liability created by statute, when no other time is fixed, be brought within 5 years. The action was brought on March 18, 1997. Refund (Billing) Required is therefore based upon period from March 19, 1992 through March 18, 1997.

C - Recovery barred by doctrine of res judicata.

IT IS THEREFORE ORDERED that:

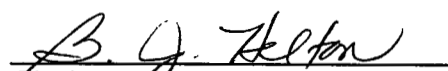
1. Movants' Motion for Rehearing is granted.
2. Finding Paragraph 36 of the Commission's Order of October 12, 1998 is stricken and replaced with Finding Paragraph 2 of this Order.
3. Ordering Paragraph 4 of the Commission's Order of October 12, 1998 is stricken.
4. Within 30 days of the date of this Order, Spanish Cove shall adjust the bills of the customers listed in Table I to correct for improper billings. For customers who were overcharged, Spanish Cove shall refund by direct payment the excess amount charged. For customers who were undercharged, Spanish Cove shall issue a charge for the undercharged amount on its next billing. In making these adjustments,


Spanish Cove shall observe the limitations contained in KRS 278.225 and KRS 413.120(2).


5. All other provisions of the Commission's Order of October 12, 1998 are affirmed and remain in full force and effect.

Done at Frankfort, Kentucky, this 24th day of November, 1998.

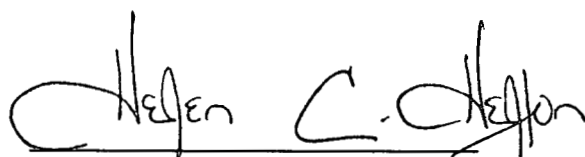
PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director